

Alex J. Hardee, CO Bar No. 51744 (*pro hac vice pending*)  
Heidi J. McIntosh, CO Bar No. 48230 (*pro hac vice pending*)  
Earthjustice  
633 17th Street, Suite 1600  
Denver, CO 80202  
Phone: (303) 623-9466  
Fax: (303) 623-8083  
ahardee@earthjustice.org  
hmcintosh@earthjustice.org

Attorneys for Plaintiff Patricia Gerrodette

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
TUCSON DIVISION

Patricia Gerrodette,

Plaintiff;

v.

United States Department of the Interior  
and United States Bureau of Land  
Management,

Defendants.

No. \_\_\_\_\_

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

**INTRODUCTION**

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to order the production of records in the possession or control of the Department of the Interior Office of the Solicitor (OIS) and the Bureau of Land Management (BLM) (or

collectively, Federal Defendants). The records relate to proposals to settle federal reserved water rights associated with the San Pedro Riparian National Conservation Area, which are the subject of a pending adjudication in Arizona Superior Court. Federal Defendants have failed to: 1) provide the mandatory determinations in response to Plaintiff Patricia Gerrodette's April 16, 2018 FOIA request seeking those records; and 2) promptly release any responsive documents.

2. The San Pedro River is the last undammed, free-flowing river in the desert Southwest. It provides essential habitat for more than 250 species of migrating birds and more than 100 species of mammals, reptiles, and fish. It is one of the most important migratory bird flyways in the United States. Millions of songbirds use the San Pedro each year during their migrations between North and South America.

3. Recognizing the ecological, scientific, cultural, educational, and recreational significance of the San Pedro River and its riparian lands, Congress designated 36 miles of the river's upper basin as the San Pedro Riparian National Conservation Area in 1988. 16 U.S.C. § 460xx. Congress also reserved a quantity of water sufficient to fulfill the purposes of the Conservation Area. *Id.* § 460xx-1(d). Congress's reservation directed the Secretary of the Interior to file a claim for the quantification of this water right in the appropriate stream adjudication. *Id.*

4. In compliance with Congress's direction, in 1989 BLM filed its first statement of claim for the Conservation Area in the Gila River Adjudication, which is still pending in the Maricopa County Superior Court. Since 1989, BLM has filed two amended statements of claim, which have quantified the water needed to fulfill the

purposes of the Conservation Area. The Gila River Adjudication has progressed slowly and has not yet yielded a final quantification of federal reserved water rights for the Conservation Area. Trial on this issue began on January 28, 2019.

5. Since BLM first filed its statement of claim, the San Pedro River's flows have continued to decline. Groundwater pumping in the Sierra Vista watershed sub-basin has lowered the regional aquifer that supports the river's surface flows, steadily depriving the river of its groundwater-fed base flows. Increased groundwater pumping from the watershed has reduced the San Pedro's flows so significantly that its total annual average flows are now *lower* than the volume of water BLM has claimed is necessary as an instream flow to fulfill the purposes of the Conservation Area. Continued groundwater pumping threatens to dry up the river completely.

6. On information and belief, mining and business interests in Arizona have begun lobbying federal agencies, including the Interior Department and BLM, to negotiate a settlement of the Conservation Area's water rights. Settlement of the claims poses a threat to the preservation of base flows that are necessary to support the ecological functioning of the Conservation Area.

7. Gerrodette's FOIA request seeks records that comprise or relate to settlement discussions, or proposals to settle, federal reserved water rights asserted for the Conservation Area in the Gila River Adjudication. However, since receiving the request more than eight months ago, Defendants have not provided a determination of anticipated document production, nor have they produced any documents responsive to the request.

8. Gerrodette requests that the Court declare that Defendants violated FOIA, order them to provide her with responses to her outstanding request, and grant other appropriate relief, including attorney's fees and costs.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

10. Venue is proper in the District of Arizona under 5 U.S.C. § 552(a)(4)(B) because Gerrodette resides in this district.

11. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201–02.

### **PARTIES**

12. Plaintiff PATRICIA GERRODETTE has advocated on behalf of the San Pedro River for more than two decades. The local newspaper has described her as the “conscience of the community” on environmental issues.<sup>1</sup> Gerrodette seeks records concerning settlement of the Conservation Area's water rights. She will make these records available to the public and the media as part of her efforts to advocate on behalf of federal protections for the San Pedro River and the Conservation Area.

13. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITOR performs the legal work of the Interior Department and

---

<sup>1</sup> Eric Peterman, “Gerrodette takes on titans to protect the river, conservation area,” *Sierra Vista Herald* (Oct. 8, 2017), <https://goo.gl/S7Lxny>.

provides advice, counsel, and legal representation to branches of that department. The Office of the Solicitor has possession of records that Gerrodette seeks.

14. Defendant BUREAU OF LAND MANAGEMENT is a federal agency within the Interior Department. BLM is responsible for managing publicly owned lands, waters, and minerals in accordance with federal law. In particular, it is responsible for managing the Conservation Area. BLM has possession of records that Gerrodette seeks.

### **LEGAL FRAMEWORK**

15. Congress created FOIA to ensure government transparency and expeditious disclosure of government records to the public. 5 U.S.C. § 552(a). FOIA establishes the public's right to access all federal agency records unless an agency satisfies its burden to show that it may withhold them pursuant to one of nine narrowly construed exemptions. *Id.* § 552(b)(1)–(9). If a record is exempted from disclosure, FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” *Id.* § 552(b).

16. FOIA imposes strict deadlines on federal agencies when they receive a request for records. Within 20 working days of receiving a FOIA request, an agency must determine whether to disclose responsive records and must immediately notify the requester of its determination and the reasons for it. *Id.* § 552(a)(6)(A)(i). Courts have interpreted this determination to require the agency to indicate “the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents.” *See, e.g., Citizens for Responsibility & Ethics in Wash. v. Fed. Election*

*Comm’n*, 711 F.3d 180, 185 (D.C. Cir. 2013). An agency may extend this 20-day period only in “unusual circumstances” as defined by § 552(a)(6)(B)(iii), and only for a maximum of 10 working days. 5 U.S.C. § 552(a)(6)(B)(i); 43 C.F.R. § 2.16(a).

17. Following the period to make a determination, the agency must then make the requested records “promptly” available, 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i), unless it establishes that it may lawfully withhold records from disclosure under narrowly defined FOIA exemptions listed in § 552(b). In doing so, it must make reasonable efforts to search for records in a manner calculated to locate all records responsive to the request. *Id.* § 552(a)(3)(C)–(D).

18. The Interior Department’s FOIA regulations allow it to categorize requests based on the estimated time needed to respond. 43 C.F.R. § 2.15 (describing “multitrack processing”). “Simple” requests take one to five working days; “normal” requests take six to twenty days; “complex” requests take between 21 and 60 days; and “exceptional/voluminous” requests, which involve “very complex processing challenges,” take over 60 working days to process. *Id.* § 2.15(c)(1)–(4). Multitrack processing does not alter FOIA’s statutory requirement that an agency make a determination on whether to comply with the request within 20 working days. *Id.* § 2.15(f).

19. The United States district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

## **FACTUAL BACKGROUND**

20. On April 26, 2018, Gerrodette submitted a FOIA request to six federal agencies, including, for purposes relevant to this action, Federal Defendants (attached as Exhibit 1). The request seeks all records “that comprise or relate to settlement discussions, or proposals to settle, federal reserved water rights asserted for [the Conservation Area] in the Gila River Adjudication.”

21. Four agencies have responded to Gerrodette’s FOIA request. The Interior Department’s Office of the Secretary and Office of the Field Solicitor provided “no records” determinations on November 5, 2018, and November 26, 2018. The BLM Arizona State Office and Department of Justice are coordinating with Gerrodette to release responsive records in batches.

22. By contrast, Defendants OIS and BLM Headquarters have failed to provide determinations or release any responsive records.

### Office of the Solicitor

23. The OIS acknowledged the request on April 30, 2018 and assigned it FOIA Tracking #SOL-2018-00158. This acknowledgment letter granted Gerrodette’s fee waiver request and concluded that “we are searching within the Office of the Solicitor.”

24. The acknowledgment letter is not a determination on the scope of the documents the OIS would produce. It did not include an anticipated completion date, nor did it determine any planned withholdings or exemptions. In the more than six months since this acknowledgment letter, the OIS has not provided a determination, a timetable for production of the requested documents, or any responsive materials.

25. Gerrodette has been unable to reach the OIS, despite repeated attempts. Gerrodette's counsel called the OIS on June 12, July 17, September 6, and November 2, 2018, and left a voice message each time. The OIS has not returned counsel's phone calls. Counsel emailed OIS asking for an update on July 17, again with no response. Counsel wrote OIS on November 14, again seeking to resolve the delay, but OIS did not respond to this letter.

BLM Headquarters

26. BLM Headquarters has not acknowledged Gerrodette's FOIA request in any way. Gerrodette's counsel called BLM on September 6 and November 2, 2018, and left a voice message each time. BLM Headquarters has not returned counsel's phone calls. Counsel wrote BLM Headquarters on November 15, 2018, again seeking to resolve the delay. BLM did not respond to this letter.

**FIRST CLAIM FOR RELIEF**  
***(Violation of FOIA—Failure to make determinations)***

27. The allegations in all preceding paragraphs are hereby incorporated by reference.

28. Gerrodette has a statutory right to receive a determination from Federal Defendants on her April 16, 2018 FOIA request within the deadline Congress set in 5 U.S.C. § 552(a)(6)(A)(i).

29. Federal Defendants violated FOIA by failing to make the required determination.



**SECOND CLAIM FOR RELIEF**  
***(Violation of FOIA—Failure to provide records)***

30. The allegations in all preceding paragraphs are hereby incorporated by reference.

31. FOIA requires Federal Defendants to process Gerrodette's FOIA request and "promptly" provide responsive records not subject to specified exemptions.

32. Federal Defendants failed to promptly disclose records, or reasonably segregable portions of records subject to exemptions, that are responsive to Gerrodette's FOIA request.

**PRAYER FOR RELIEF**

Gerrodette respectfully requests that this Court:

1. Issue a declaratory judgment that Defendants violated FOIA by failing to respond to Gerrodette's FOIA request;
2. Order Defendants to provide a determination on Gerrodette's FOIA request;
3. Order Defendants to conduct searches that are reasonably calculated to locate all records responsive to Gerrodette's FOIA request;
4. Maintain jurisdiction over this action until Defendants are in compliance with FOIA and every order of this Court;
5. Award Gerrodette her costs and reasonable attorney's fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412; and
6. Provide any other relief it deems proper.

Respectfully submitted this 5th day of March, 2019.

/s/ Alex J. Hardee

Alex J. Hardee (*pro hac vice pending*)

Heidi J. McIntosh (*pro hac vice pending*)

Earthjustice

633 17th Street, Suite 1600

Denver, CO 80202

Phone: (303) 623-9466

Fax: (303) 623-8083

[hmcintosh@earthjustice.org](mailto:hmcintosh@earthjustice.org)

[ahardee@earthjustice.org](mailto:ahardee@earthjustice.org)

*Counsel for Plaintiff Patricia Gerrodette*